TABLE OF CONTENTS

	PAGE
Preliminary Statement	2
Opinions Below	2
Jurisdiction	2
Statute Involved	3
Question Presented	3
Statement of the Case	4
The Questions Are Substantial	7
Conclusion	21

APPENDIX

Opinion of Lasker, D. J. and Hays, C. J. dated April 27, 1972	1a
Dissenting Opinion of Palmieri, D. J. dated April 27, 1972	14a
Order and Judgment of Hays, C. J. and Lasker, D. J. entered June 1, 1972	18a
Notice of Appeal of Cathedral Academy, St. Ambrose School and Bishop Loughlin Memorial High School	20a
Notice of Appeal of Bais Yaakov Academy for Girls and Yeshivah Rambam	23a
Chapter 138 of the 1970 Laws of New York	26a

Table of Authorities

Cases

PAGE

Board of Education v. *Allen*, 392 U.S. 236 (1968) 7, 10, 19

Committee for Public Education & Religious Liberty v. *Rockefeller*, 322 F. Supp. 678 (S.D.N.Y. 1971) 5, 14

Earley v. *DiCenso*, 403 U.S. 602 (1971) 3, 17

Everson v. *Board of Education*, 330 U.S. 1 (1947) 11

Lemon v. *Kurtzman*, 403 U.S. 602 (1971) 3, 12, 13, 16, 17

Robinson v. *DiCenso*, 403 U.S. 602 (1971) 3, 17

Tilton v. *Richardson*, 403 U.S. 672 (1971) 3, 13, 14, 15 17, 18, 19

Statutes, Regulations and Rules

28 U.S.C. § 1253 3
28 U.S.C. § 1343(3) 2
28 U.S.C. § 2101(b) 3
28 U.S.C. § 2281 ..... 2, 5
28 U.S.C. § 2284 ..... 2, 5
Fed. R. Civ. P. 12(b)(1) and (6) 5
Fed. R. Civ. P. 24 ..... 5, 7
Fed. R. Civ. P. 62(c)(1) 6
N.Y. Educ. Law § 207 8
N.Y. Educ. Law § 215 8
N.Y. Educ. Law §§ 801-10 9
N.Y. Educ. Law § 3204 .....7, 8, 9

PAGE

N.Y. Educ. Law § 3210(2) 9
N.Y. Educ. Law § 3211 9
[1892] Laws of N.Y. ch. 378, § 26 20
Regulations of the Commissioner of Education
§ 176.1(b) 10

Other

N.Y. Times, May 5, 1972 20

IN THE

Supreme Court of the United States

October Term, 1972

No. .....

ARTHUR LEVITT, as Comptroller of the State of New York, and EWALD B. NYQUIST, as Commissioner of Education of the State of New York,

—and—

CATHEDRAL ACADEMY, ST. AMBROSE SCHOOL, BISHOP LOUGHLIN MEMORIAL HIGH SCHOOL, BAIS YAAKOV ACADEMY FOR GIRLS and YESHIVAH RAMBAM,

—and—

SENATOR EARL W. BRYDGES, as Majority Leader and President Pro Tem of the New York State Senate,

Appellants,

vs.

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, BERNARD BACKER, ALGERNON D. BLACK, THEODORE BROOKS, HERSCHEL CHANIN, NAOMI COWAN, REBECCA GOLDBLUM, BENJAMIN HAIBLUM, BLANCHE LEWIS, EDWARD D. MOLDOVER, ARYEH NEIER, DAVID SEELEY, ALBERT SHANKER and HOWARD M. SQUADRON,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT of APPELLANTS CATHEDRAL ACADEMY, ST. AMBROSE SCHOOL, BISHOP LOUGHLIN MEMORIAL HIGH SCHOOL, BAIS YAAKOV ACADEMY FOR GIRLS and YESHIVAH RAMBAM

Appellants Cathedral Academy, St. Ambrose School, Bishop Loughlin Memorial High School, Bais Yaakov Academy for Girls and Yeshivah Rambam appeal from the judgment of the United States District Court for the Southern District of New York entered on June 1, 1972, permanently enjoining the enforcement of a statute of the State of New York, and submit this Statement to show that this Court has jurisdiction of the appeal and that a substantial question is presented.

Opinions Below

The opinion of the majority of the United States District Court for the Southern District of New York, upon which the judgment appealed from was entered, and the dissenting opinion are, as yet, unreported. Copies of both opinions are set forth in the Appendix hereto, commencing at pages 1a and 14a. An earlier opinion granting appellees' motion to convene a three-judge District Court in this case is reported at 322 F.Supp. 678.

Jurisdiction

This suit was brought pursuant to 28 U.S.C. §§ 1343(3) and 2281, 2284 to enjoin the enforcement of a statute of the State of New York as being in violation of the First Amendment to the United States Constitution. The judgment of the District Court was entered on June 1, 1972. A copy of the judgment is set forth in the Appendix, pages 18a-19a. Appellants Cathedral Academy, St. Ambrose School and Bishop Loughlin Memorial High School filed their Notice of Appeal on June 30, 1972 in the District Court. Appellants Bais Yaakov Academy for Girls and

Yeshivah Rambam filed their Notice of Appeal in the District Court on July 11, 1972. Copies of both notices of appeal are set forth in the Appendix at pages 20a and 23a, respectively.

The jurisdiction of this Court to review the judgment of the District Court by direct appeal is conferred by Title 28, United States Code, Sections 1253 and 2101(b). The most recent cases sustaining the jurisdiction of this Court to review the judgment in this case on direct appeal are *Lemon* v. *Kurtzman, Earley* v. *DiCenso* and *Robinson* v. *DiCenso,* 403 U.S. 602 (1971), and *Tilton* v. *Richardson,* 403 U.S. 672 (1971).

Statute Involved

The statute involved is Chapter 138 of the 1970 Laws of New York, entitled "An Act to provide for the apportionment of state monies to certain nonpublic schools in connection with inspection and examination, and making an appropriation therefor," the full text of which is set forth in the Appendix, commencing at page 26a.

Question Presented

Whether Chapter 138 of the 1970 Laws of New York, which reimburses religiously-affiliated nonpublic schools for the record keeping and other secular services which they are required to perform under the New York Education Law, gives rise to "excessive entanglement" between church and state and violates the Establishment Clause of the First Amendment to the United States Constitution.

Statement of the Case

Appellants Cathedral Academy, St. Ambrose School, Bishop Loughlin Memorial High School, Bais Yaakov Academy for Girls and Yeshivah Rambam are nonpublic elementary and/or secondary schools situated in the State of New York. Appellants Levitt and Nyquist are Comptroller and Commissioner of Education of the State of New York, respectively. Appellant Senator Earl W. Brydges is the Majority Leader and President Pro Tem of the New York State Senate.

Chapter 138 of the 1970 Laws of New York [hereinafter referred to as "Mandated Services Act" or the "Act"] provides for the reimbursement of nonpublic schools for expenses of services for examination and inspection in connection with administration, grading and the compiling and reporting of the results of tests and examinations, maintenance of records of pupil enrollment and reporting thereon, maintenance of pupil health records, recording of personnel qualifications and characteristics and the preparation and submission to the state of various other reports as provided for or required by law or regulation. The reimbursement formulas for such services are 15 cents per day per pupil in grades one through six and 25 cents per day per pupil in grades seven through twelve.

On July 30, 1970, appellees, the individuals among whom allegedly are New York taxpayers, instituted this suit in the United States District Court for the Southern District of New York, praying, *inter alia,* that appellants Levitt and Nyquist be permanently enjoined from approving or paying any funds of the State of New York pursuant to the

Mandated Services Act to schools owned or controlled by religious bodies or organized or engaged in the practice or teaching of religion or which limit, or give preference in, admission or employment to persons of a particular religious faith.

Appellants Levitt and Nyquist (and defendant Nelson A. Rockefeller, as Governor of the State of New York) moved to dismiss the complaint pursuant to Rule 12(b)(1) and (6) of the Federal Rules of Civil Procedure (FRCivP). Appellees moved for the convening of a three-judge District Court pursuant to 28 U.S.C. §§ 2281, 2284. Thereafter, appellants Cathedral Academy, St. Ambrose School, Bishop Loughlin Memorial High School, Bais Yaakov Academy for Girls and Yeshivah Rambam, all of which were eligible for payments under the Mandated Services Act, moved to intervene as parties defendant pursuant to Rule 24, FRCivP.

On November 10, 1970, Judge Morris E. Lasker, before whom the motions came on to be heard, granted the motion to intervene. On January 28, 1971, he granted defendant Rockefeller's motion to dismiss the complaint as to him but denied the motion to dismiss in all other respects. *See Committee for Public Education & Religious Liberty* v. *Rockefeller,* 322 F.Supp. 678 (S.D.N.Y. 1971). Judge Lasker also ruled that the complaint raised a substantial federal constitutional question and that it was therefore necessary to convene a three-judge District Court, whereupon such a court consisting of Judge Lasker, the Hon. Paul R. Hays, U. S. Circuit Judge and the Hon. Edmund L. Palmieri, U. S. District Judge, was duly constituted on February 24, 1971. A hearing on the merits was held on April 11, 1972.

On April 27, 1972, Judge Lasker handed down an opinion, concurred in by Judge Hays, that the Mandated Services Act violates the Establishment Clause of the First Amendment to the United States Constitution. The opinion reads, in part, as follows:

> . . . Either the statute falls because a system of surveillance and control would create excessive entanglement, or, without such a system, the schools would be free to use funds for religious purposes. The constitution is breached whichever route is chosen. Appendix, p. 11a.

Judge Palmieri dissented, stating that in his opinion, the Mandated Services Act is

> a legitimate exercise of the duty of the state to assure that all children, regardless of the school they attend, receive adequate and full-time instructions in the secular subjects required by standards fixed by law. Appendix, p. 15a.

On June 1, 1972, the judgment appealed from herein was entered, permanently enjoining appellants Levitt and Nyquist "and their agents and all persons acting for or on behalf of the State of New York . . . from making any payments or disbursements out of State funds pursuant to the provisions of Chapter 138 of the New York Laws of 1970, in payment for or reimbursement of any monies heretofore or hereafter expended by nonpublic elementary and secondary schools."

On June 20, 1972, the three-judge District Court reconvened to hear in open court the motion of appellants Levitt, Nyquist, Cathedral Academy, St. Ambrose School and Bishop Loughlin Memorial High School to suspend its injunction pursuant to Rule 62(c)(1), FRCivP pending

appeal to this Court. At that time, the District Court granted the motion of appellant Senator Earl W. Brydges for leave to intervene in the proceedings as a party defendant pursuant to Rule 24, FRCivP, and he thereupon joined in the motion to suspend the injunction pending appeal.[1]

The Questions Are Substantial

The Mandated Services Act is unlike any other statute in the United States. It results from the supervision which the State of New York has historically exercised over the education of children in nonpublic schools.

The public and nonpublic schools in the State of New York comprise (and have long comprised) a single system of education under the jurisdiction of the Board of Regents and the Commissioner of Education, who are empowered and required to ensure that all the schools in the system give their pupils an adequate education along the lines laid down by statute and by the regulations of the Commissioner. The broad extent to which nonpublic schools in New York are regulated and controlled by state authority with respect to the secular aspects of their operations was noted by this Court in *Board of Education* v. *Allen*, 392 U.S. 236 (1968).

The compulsory education statute (N.Y. Educ. Law §3204) requires all children to attend full-time instruction

[1] The motion was denied on June 29, 1972, Judge Palmieri dissenting. On July 17, 1972, Mr. Justice Blackmun denied the application of appellants Levitt, Nyquist, Cathedral Academy, St. Ambrose School, Bishop Loughlin Memorial High School and Senator Earl W. Brydges for a stay pending filing and final disposition of this appeal.

"at a public school or *elsewhere.*" If "elsewhere," the instruction given must be *"at least substantially equivalent"* to that given in the public schools of the district where the child resides. To ensure this, statutes and regulations impose a long list of detailed requirements upon nonpublic schools in such fields as attendance, curricula, accreditation, examinations and diplomas. The Regents and the Commissioner have long been given the broadest powers of visitation and inspection. Section 215 of the New York Education Law provides:

> The regents, or the commissioner of education, or their representatives, may visit, examine into and inspect, any institution in the university and any school or institution under the educational supervision of the state, and may require, as often as desired, duly verified reports therefrom giving such information and in such form as the regents or the commissioner of education shall prescribe. For refusal or continued neglect on the part of any institution in the university to make any report required, or for violation of any law or any rule of the university, the regents may suspend the charter or any of the rights and privileges of such institution.[2]

Under N.Y. Educ. Law § 207, the Regents are granted broad "legislative functions" over the entire field of education, both public and nonpublic. Section 3204 of the Education Law prescribes the type of instruction required under the compulsory education system and outlines in subsection (3) thereof twelve courses to be taken by every pupil in public elementary and secondary schools. Section 3204(2) provides:

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[2] N.Y. Educ. Law § 202 defines "any institution in the university" as including all institutions of learning, both public and nonpublic.

> Quality and language of instruction; textbooks. Instruction may be given only by a competent teacher. . . . Instruction given to a minor elsewhere than at a public school shall be at least substantially equivalent to the instruction given to minors of like age and attainments at the public schools of the city or district where the minor resides.

Thus, pupils in nonpublic elementary schools are required by state law to receive instruction comparable to their public school brethren in the "twelve common school branches" of arithmetic, reading and other essential secular subjects. In addition to providing instruction in accordance with Section 3204, all nonpublic schools must provide instruction in a long list of other specified areas.[3] The Education Law also contains provisions mandating the amount and character of attendance by pupils at nonpublic schools (Section 3210(2)) and requiring such schools to maintain appropriate attendance records (Section 3211). Pupil health records must be maintained by nonpublic, as well as public, schools. In addition, nonpublic schools must maintain records relating to the qualifications and characteristics of their teaching personnel for inspection by state authorities. The Mandated Services Act provides for reimbursement of nonpublic schools for the expenses incurred in connection with the administrative burden imposed by these state requirements.

The reimbursement formulas in the Act are 15 cents per day of attendance for pupils in grades one through six and 25 cents per day of attendance for pupils in grades seven through twelve. Based on attendance of 180 days, nonpublic schools are reimbursed in the amounts of $27

[3] *See* N.Y. Educ. Law §§ 801-10.

per elementary pupil per year and $45 per secondary pupil per year. Part of the record in this case is an Exhibit D to the Answers of appellant Nyquist to appellees' interrogatories. This exhibit is a report of studies conducted under the auspices of the New York State Education Department which concludes that the apportionment formulas of the Mandated Services Act are justified. That is, based on actual analyses of the specific services mandated[4] and thus provided and the costs thereby incurred by a number of nonpublic schools in New York State, the studies showed in each instance that the schools incurred greater costs in providing the various neutral, nonideological services than they were reimbursed for under the Act. This was pointed out by Judge Palmieri in dissent. *See infra,* p. 16.

In *Allen,* this Court put the matter of state regulation of nonpublic schools in the following terms:

> Since *Pierce,* a substantial body of case law has confirmed the power of the States to insist that attendance at private schools, if it is to satisfy state compulsory-attendance laws, be at institutions which provide minimum hours of instruction, employ teachers of specified training, and cover prescribed subjects of instruction.

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[4] One of the Regulations of the Commissioner of Education, § 176.1(b), requires, for example, that:

> [A nonpublic] school shall conduct in all grades in which instruction is offered a continuing program of individual pupil testing designed to provide an adequate basis for evaluating the pupil achievement, and in addition shall administer, rate and report the results of all specific tests or examinations which may be prescribed by the commissioner.

The state-prescribed examinations are the so-called PEP (Pupil Evaluation Program) tests, Regents examinations and Regents Scholarship examinations. These exams, while important, are, of course, only a small part of the entire, continuing program of testing and evaluation of pupils which is required.

> Indeed, the State's interest in assuring that these standards are being met has been considered a sufficient reason for refusing to accept instruction at home as compliance with compulsory education statutes. These cases were a sensible corollary of *Pierce* v. *Society of Sisters*: 'if the State must satisfy its interest in secular education through the instrument of private schools, it has a proper interest in the manner in which those schools perform their secular educational function. Another corollary was *Cochran* v. *Louisiana State Board of Education*, 281 U.S. 370 (1930), where appellants said that a statute requiring school books to be furnished without charge to all students, whether they attended public or private schools, did not serve a "public purpose", and so offended the Fourteenth Amendment. Speaking through Chief Justice Hughes, the Court summarized as follows its conclusion that Louisiana's interest in the secular education being provided by private schools made provision of textbooks to students in those schools a properly public concern: "[The State's] interest is education, broadly; its method, comprehensive. Individual interests are aided only as the common interest is safeguarded."[5]

The Mandated Services Act did not establish a relationship between the State of New York and nonpublic schools where none existed before or where such relationships, on their face, are constitutionally impermissible. This relationship, insofar as is pertinent here, was created by the various statutes, rules and regulations imposing requirements on nonpublic schools. The Act merely assures full compliance therewith.

There is no decision of this Court or of any other court controlling the issues of law and fact raised in the District

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[5] 392 U.S. at 245-47 (footnotes omitted). *See also Everson* v. *Board of Education*, 330 U.S. 1, 17 (1947).

Court and now raised on appeal. The clearest indication of this is the incisive dissenting opinion of Judge Palmieri.

The majority opinion of the District Court relies primarily on the decision of this Court in *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971). But that decision dealt specifically with a Pennsylvania enactment providing for that state's payment of parochial schoolteachers for teaching mathematics, modern foreign languages, physical science and physical education and a Rhode Island statute providing for the payment by that state of salary supplements to parochial schoolteachers in the amount of 15 percent of their salaries. Clearly, neither law examined in *Lemon* v. *Kurtzman* had anything to do with the neutral, nonideological services required of, and provided by, all schools, public and nonpublic alike, and which are within the purview of the Mandated Services Act. Indeed, this Court took specific note of the fact in *Lemon* v. *Kurtzman* that its "decisions from *Everson* to *Allen* have permitted the States to provide church-related schools with secular, neutral, or nonideological services, facilities, or materials. Bus transportation, school lunches, public health services, and secular textbooks supplied in common to all students were not thought to offend the Establishment Clause." 403 U.S. at 616-17. Judge Palmieri stated the matter as follows:

> . . . It has long been held that separation of church and state cannot mean the absence of all contact. Beginning with state police and fire protection for churches, the theory of allowable contact has expanded with the reimbursement procedures in *Everson* v. *Board of Education*, 330 U.S. 1 (1947), the allocation procedure for free books in *Board of Education* v. *Allen*, 392 U.S. 236 (1968), and *Cochran* v. *Louisiana*

State Board of Education, 281 U.S. 370 (1930), and the administrative relationships inherent in the tax exemption in *Walz* v. *Tax Commission of the City of New York,* 397 U.S. 644 (1970). If, as the Supreme Court pointed out in *Allen, supra,* at 247, a state "has a proper interest in the manner in which those [private] schools perform their secular educational function" then that interest is appropriately implemented here. I can perceive nothing in the decision of the Supreme Court in *Lemon* v. *Kurtzman* and *Earley* v. *DiCenso,* 403 U.S. 602 (1971), which requires the conclusions reached by the majority. There is neither entanglement nor involvement between church and state, let alone "the excessive government entanglement with religion" condemned in that case, *supra* at 613, and in *Walz, supra* at 674. Indeed, reimbursement for attendance and examination services duly performed by operation of law is clearly within the guidelines established by the Supreme Court in *Lemon-Earley* . . . Appendix, pp. 16a-17a (footnote omitted).

In the *Lemon* v. *Kurtzman* opinion, this Court stated in reference to cases such as the one at bar that:

> . . . Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . ; finally, the statute must not foster "an excessive government entanglement with religion" . . . 403 U.S. at 612-13.

In the companion decision handed down at the same time, *Tilton* v. *Richardson,* 403 U.S. 672 (1971), the lead opinion contains a fourth test, to wit, "does the implementation of

the Act inhibit the free exercise of religion?" 403 U.S. at 678. These tests were raised as the controlling issues, argued and briefed in the District Court. None of the three judges in that court found that the Mandated Services Act has a sectarian purpose or that its principal or primary effect is the advancement of religion or that its implementation has inhibited the free exercise of religion.[6] Indeed, Judge Lasker had earlier stated in his opinion granting the motion to convene the three-judge District Court that:

> We may admit that the statute's purpose is not offensive. The objectives of assuming that New York's "precious resource, the young people of the state, receive educational opportunity which will prepare them for the challenges of American life in the last decades of the twentieth century" is beyond question a worthy and legitimate legislative concern.[7]

However, two judges in the District Court concluded that:

> The nature of the aid provided here [by the Act] is precisely the same as the state aid provided by Pennsylvania in *Lemon*—that is, financial assistance paid directly to the church-related school. Appendix, p. 9a.

Even if this were true (and it obviously is not), the two judges overlooked much precedent in this regard, which was summarized as follows in the lead opinion in *Tilton*:

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[6] The Mandated Services Act had been fully enforced for the better part of two school years before the District Court was called upon to act upon appellees' claim(s) for relief, and the court therefore had more than appellees' hypotheses about the Act upon which to gauge the tests with respect to the Act's purpose and effects.

[7] *Committee for Public Education & Religious Liberty* v. *Rockefeller*, 322 F.Supp. 678, 683 (S.D.N.Y. 1971).

> The simplistic argument that every form of financial aid to church-sponsored activity violates the Religion Clauses was rejected long ago in *Bradfield* v. *Roberts*, 175 U.S. 291 (1899). There a federal construction grant to a hospital operated by a religious order was upheld. Here the Act is challenged on the ground that its primary effect is to aid the religious purposes of church-related colleges and universities. Construction grants surely aid those institutions in the sense that the construction of buildings will assist them to perform their various functions. But bus transportation, textbooks, and tax exemptions all gave aid in the sense that religious bodies would otherwise have been forced to find other sources from which to finance these services. Yet all of these forms of governmental assistance have been upheld. 403 U.S. at 679.

Despite the almost two years of uninterrupted enforcement of the Mandated Services Act in New York, the District Court majority's opinion resorts to speculation to support the conclusion that the Act represents unconstitutional excessive entanglement between church and state. For example:

> . . . It is not unreasonable to assume that, in this day of tight budgets and taxpayer uneasiness, the dictates of sound administration, or political pressures, will likely give birth to a system of surveillance and controls intended to assure that, at the least, the state is not paying for more than it is receiving. Appendix, p. 10a.

And:

> It is difficult to see how the Board of Regents or the Commissioner can in good faith implement the language of section 8 without sooner or later instituting

the type of surveillance and controls which the *Lemon* Court found to foster excessive entanglement.

Assuming, however, that such a prognosis is unfounded, the alternative leaves the statute even more vulnerable. For if no system of audit or control is to be instituted, this will leave the schools free, as they apparently are now, to keep their shares of the apportioned monies regardless of whether their expenses are as great as their receipts, and to use any excess for the general purposes of their religious missions. Appendix, pp. 10a-11a.

But, Judge Palmieri pointed out:

> *The record is uncontested that the sums appropriated by the legislature to assure attendance and adequate examination procedures are much less than the schools expend for such purposes. This provides adequate assurance that government funds are not available for examination functions peculiar to religious institutions.* Appendix, p. 15a.

In holding the Pennsylvania statute in *Lemon* v. *Kurtzman* unconstitutional, this Court pointed out that that state's "post-audit power to inspect and evaluate a church-related school's financial records and to determine which expenditures are religious and which are secular creates an intimate and continuing relationship between church and state." 403 U.S. at 621-22. No auditing of the books of nonpublic schools is provided for or required by the Mandated Services Act. Furthermore, the Act has not given rise to a "comprehensive, discriminating, and continuing state of surveillance," something which this Court found to be inevitably required in *Lemon* v. *Kurtzman*. *See* 403 U.S. at 619. Whatever surveillance is involved herein has existed and been carried out as a result of the

long-established procedures under the compulsory education laws, not the enactment of the Mandated Services Act. In short, the Act does not present the potential for excessive involvement or entanglement which led this Court to strike down the teachers' salary supplement statutes in *Lemon* v. *Kurtzman* and *DiCenso*. First, the services mandated are purely secular. *E.g.,* attendance records. Secondly, the requirement for these services originated with the state. *E.g.,* filing of Report of Nonpublic Schools. Third, the costs incurred in providing these services have been carefully determined. *E.g.,* $27 per year per elementary school pupil, $45 per year per secondary school pupil. And fourthly, the money apportioned pursuant to the Mandated Services Act is done so retroactively, i.e., as reimbursement for the services already rendered.[8]

In *Lemon* v. *Kurtzman,* this Court stated that "[i]n order to determine whether the government entanglement with religion is excessive, we must examine the character and purposes of the institutions which are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and religious authority." 403 U.S. at 615. In *Tilton,* it was pointed out that "[n]o one of these three factors standing alone is necessarily controlling." 403 U.S. at 688 (Burger, C.J.).

The lead opinion in *Tilton* states that a statute cannot be declared unconstitutional on the basis of a hypothetical "profile". *See* 403 U.S. at 682. Appellants Cathedral Academy, St. Ambrose School and Bishop Loughlin Memorial

[8] A nonpublic school applying for reimbursement must submit proof that it provided all of the services mandated on a simple Form SA-170, a copy of which is in the record as Exhibit H-1 annexed to appellant Nyquist's Answers to appellees' interrogatories. Doc. No. 24, Record on Appeal.

High School are all affiliated with the Roman Catholic Church. Appellants Bais Yaakov Academy for Girls and Yeshivah Rambam are Jewish day schools. The record in this case (in the form of answers to interrogatories[9]) shows that none of the three Catholic schools actually before the District Court and now this Court is an integral part of the religious mission of the Church. All are an integral part of the communities in which they are located. Their *raison d'etre* is education. They do not impose religious restrictions on pupil admissions or on faculty appointments. They do not require their pupils to attend religious activities or to adhere to a particular faith. Indeed, the character and purposes of appellants Cathedral Academy, St. Ambrose School and Bishop Loughlin Memorial High School are essentially similar to the character and purposes found to exist with respect to the four Catholic colleges in Connecticut which were the subject of this Court's decision in *Tilton*. Chief Justice Burger observed:

> . . . All four schools are governed by Catholic religious organizations, and the faculties and student bodies at each are predominantly Catholic.[10] Nevertheless, the evidence shows that non-Catholics were admitted as students and given faculty appointments. Not one of these four institutions requires its students to attend religious services. Although all four schools require their students to take theology courses, the parties stipulated that these courses are taught ac-

[9] Doc. No. 21, Record on Appeal.

[10] This is not true with respect to Cathedral Academy, and it may not be true with respect to Bishop Loughlin Memorial High School. Out of a total enrollment of 513 pupils at Cathedral Academy, 231 are non-Catholic. In addition, 95% of Cathedral Academy's pupils come from a poverty area of Albany; 235 are black. Bishop Loughlin Memorial High School maintains no records of the religious affiliations of its students. More than half, however, come from federally designated poverty areas.

cording to the academic requirements of the subject matter and the teacher's concept of professional standards. The parties also stipulated that the courses covered a range of human religious experiences and are not limited to courses about the Roman Catholic religion. The schools introduced evidence that they made no attempt to indoctrinate students or to proselytize. Indeed, some of the required theology courses at Albertus Magnus and Sacred Heart are taught by rabbis. Finally, as we have noted, these four schools subscribe to a well-established set of principles of academic freedom, and nothing in this record shows that these principles are not in fact followed. In short, the evidence shows institutions with admittedly religious functions but whose predominant higher education mission is to provide their students with a secular education. 403 U.S. at 686-87.

This Court in *Allen* specifically refused to assume that religiosity in the parochial elementary and secondary schools of the State of New York necessarily permeates the secular education that they provide. *See Tilton* v. *Richardson*, 403 U.S. at 681. The appellees in this case did not prove otherwise in the District Court.

In summary, an examination of the record in this case with respect to the nature of the aid that the state provides, the relationship between the state and nonpublic schools and the character and purposes of the institutions involved should indicate to this Court that the record does not support the District Court majority's conclusion that the Mandated Services Act entails unconstitutional excessive entanglement between church and state.

The record in this case also does not support the District Court majority's speculation with respect to divisive po-

litical activity.[11] Indeed, both the history of the Mandated Services Act and the history of nonpublic education in the State of New York, in general, show a remarkable lack of political divisiveness.[12] Certainly, differences of opinion are part of the American political process. But divisiveness, in the negative context of the word, has been all but nonexistent with respect to the Mandated Services Act. There has not been any annual legislative appropriation dispute over the Act. Furthermore, there hardly could be such discord in view of the Act's limited scope and restricted, precise formulas. Then again, public and nonpublic schools have constituted a unitary system of education in the State of New York since the eighteenth century, and this long history clearly belies any potential for political divisiveness in this area. For example, from 1892 through 1968, state monies were apportioned to nonpublic schools in compliance with state rules and regulations. *See, e.g.,* An Act to Revise and Consolidate the Laws Relating to the University of the State of New York, [1892] Laws of N.Y. ch. 378, §26. The history of this legislation hardly manifests political divisiveness or even a potential therefor.

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[11] *See* Appendix, p. 12a.

[12] In fact, the only divisiveness with respect to the Mandated Services Act seems to have been generated by the appellees, who, as Judge Palmieri noted, "appear to be making a career of this type of destructive litigation." Appendix, p. 15a, n.1. *Cf.* N.Y. Times, May 5, 1972, at 40, cols. 3-4.

Conclusion

In view of the foregoing, it is submitted that the majority of the District Court was in error in concluding that the Mandated Services Act is unconstitutional, as has been so succinctly pointed out by their colleague, Judge Palmieri, and that the questions presented by this appeal are substantial and are of extraordinary public importance.

Dated: August 16, 1972

Respectfully submitted,

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Opinion of Lasker, *D.J.* and Hays, *C.J.*
Dated April 27, 1972

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

70 Civ. 3251

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, *et al.*,

Plaintiffs,

—against—

ARTHUR LEVITT, as Comptroller of the State of New York, and EWALD B. NYQUIST, as Commissioner of Education of the State of New York,

Defendants,

and

CATHEDRAL ACADEMY, Albany, New York, ST. AMBROSE SCHOOL, Rochester, New York, BISHOP LOUGHLIN MEMORIAL HIGH SCHOOL, Brooklyn, New York, BAIS YAAKOV ACADEMY FOR GIRLS, Richmond Hill, New York, and YESHIVAH RAMBAM, Brooklyn, New York,

Intervenor-Defendants.

Before

HAYS, *Circuit Judge,*
PALMIERI and LASKER, *District Judges*

LASKER, *D.J.*

We are called upon to determine the constitutionality of Chapter 138 of New York State's laws of 1970, which appro-

priates $28,000,000 to be paid to nonpublic schools for expenses incurred in complying with requirements of state law of which the principal are the testing of pupils and maintenance of attendance and health records.[1]

In 1970 there were 850,000 students in nonpublic schools in New York. Chapter 138 includes the following legislative finding:

> "That the state has a primary responsibility to assure that its precious resource, the young people of the state, receive educational opportunity which will prepare them for the challenges of American life in the last decades of the twentieth century.
>
> "That the state has the duty and authority to provide the means to assure, through examination and inspection, and through other activities, that all of the young people of the state, regardless of the school in which they are enrolled, are attending upon instruction as required by the education law and are maintaining levels of achievement which will adequately prepare them, within their capabilities.
>
> "That these fundamental objectives are accomplished with respect to public schools in part through the provision by the state of aid to local school districts to meet such costs."

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[1] The appropriation is to be paid to nonpublic schools "for expenses of services for examination and inspection in connection with administration, grading and the compiling and reporting of the results of tests and examinations, maintenance of records of pupil enrollment and reporting thereon, maintenance of pupil health records, recording of personnel qualifications and characteristics and the preparation and submission to the state of various other reports as provided for or required by law or regulation." (Chap. 138 of the Laws of 1970).

Plaintiffs are taxpayers of New York and an unincorporated association whose members are New York residents whose objectives include opposition to use of public funds for the support of sectarian or religious schools. Defendants are the Commissioner of Education, who administers the statute, and the State Comptroller, who makes payment of the appropriated funds. Intervenors are Catholic and Jewish parochial schools who are beneficiaries of the Act.

The record contains defendants' and intervenors' answers to plaintiffs' interrogatories. No factual disputes exist.

Plaintiffs sue to enjoin the enforcement of the statute. Defendants move for judgment, claiming that the statute violates neither the federal nor the state constitution, and to dismiss the complaint on the ground that it raises a threshold question of violation of the constitution of the State of New York.

I.

The statute, which became effective July 1, 1970, directs the Commissioner of Education to apportion annually to nonpublic schools the sum of $27 for each pupil in average daily attendance in the first six grades and $45 for those in grades seven through twelve. The express purpose of the expenditure, as indicated above, is to compensate the schools for services "mandated" by state law or regulation of the Commissioner. These services include administration of compulsory attendance laws, Regents' examinations, and pupil evaluation program tests, as well as preparation of various reports intended to assure that minimum state educational standards are met. The services rendered are required of public and nonpublic schools alike.

The Act is construed and applied by the defendants to include as permissible beneficiaries schools which (a) impose religious restrictions on admissions; (b) require attendance of pupils at religious activities; (c) require obedience by students to the doctrines and dogmas of a particular faith; (d) require pupils to attend instruction in the theology or doctrine of a particular faith; (e) are an integral part of the religious mission of the church sponsoring it; (f) have as a substantial purpose the inculcation of religious values; (g) impose religious restrictions on faculty appointments; and (h) impose religious restrictions on what or how the faculty may teach. (Answer to Interrogatory 7).[2]

The beneficiary schools are required neither to account for nor return to the state any amounts received by them in excess of their actual expenditures for "mandated services." (Answers to Interrogatories 4, 7 and 11). This, of course, leaves a school free to expend any excess for whatever purpose it wishes, including religious or sectarian objectives.

Since the statute is predicated—and its constitutionality allegedly justified—on the ground that it merely reimburses the nonpublic schools for expenses of state-mandated services, post-enactment studies have been conducted compar-

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[2] It should be pointed out that intervenors Cathedral Academy, St. Ambrose School and Bishop Loughlin Memorial High School do not impose religious restrictions on admissions or require attendance of pupils at religious activities or obedience by students to the doctrine of a particular faith; that the schools contribute to the religious mission of the sponsoring church, but they do not impose religious restrictions on faculty appointments and they place restrictions on teaching only to the extent that it not be contrary to the tenets of the sponsoring church. (Intervenors' Answers to Interrogatory 3).

ing the actual cost to the schools of performing services with the amounts allocated to them by the state. The conclusions to be drawn from such reports (Exhibit D to Defendant Nyquist's Answers to Plaintiffs' Interrogatories) are cloudy. If such items as "teacher examinations" and "entrance examinations" are included in the list of "mandated services," it appears that the schools' expenses are at least as great as the amounts they receive from the state. But if those items are excluded, the amounts received from the state are substantially greater than the schools' expenses. Doubt as to which standard is properly applied is occasioned by material submitted by the Commissioner to the Board of Regents at its request which states (Exhibit G to Defendant Nyquist's Answers to Interrogatories, at p. ES 1.9):

> ". . . only the Regents Scholarship and January and June Regents Examinations might be regarded as *specifically mandated.* Inclusion of such costs only would reduce the examination figure [of $68,853] by $66,629." (Emphasis in original).

While our decision as to the constitutionality of the statute does not turn on the factual question so presented, we mention it to illustrate the lack of certainty as to the purposes for which the moneys received are actually used, or, indeed, whether they can be regarded as specifically "mandated."

Plaintiffs contend that on its face, and as applied, the statute violates the establishment clause of the First Amendment to the federal constitution, as well as Article 11, section 3, of the New York constitution, because its purpose and primary effect is to advance religion and it

gives rise to excessive governmental involvement and entanglement in religion.[3]

Defendants and intervenors argue that the statute is constitutionally justified since payments are made solely as reimbursement for the expenses of furnishing secular services mandated by the state. They contend that the Act constitutes neither sponsorship, financial support, nor active involvement in religious activity by the state and does not cause excessive entanglement of church and state. They also claim that, aside from the merits, the complaint should be dismissed for "lack of jurisdiction"[4] because the complaint raises a threshold question under the constitution of New York. This contention was exhaustively treated and rejected by the convening judge (*Committee for Public Education and Religious Liberty, et al.* v. *Rockefeller, et al.*, 322 F.Supp. 678, 687 (S.D.N.Y. 1971)). We agree with his view that neither abstention nor dismissal for the reason suggested is appropriate here. The federal and state issues are of equal importance. The statute is unambiguous on its face, and under the rule of *Wisconsin* v. *Constantineau*, 400 U.S. 433 (1971), the court should "proceed to the federal constitutional claim." Furthermore, abstention is partic-

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[3] Plaintiffs also allege that the statute constitutes compulsory taxation in aid of religion in violation of the free exercise clause of the First Amendment. In view of that rationale by which we dispose of the case, it is unnecessary to consider this argument.

[4] Defendants state the position in their brief as follows:

"The complaint should be dismissed on the ground that the Court lacks jurisdiction over the subject matter of the action in that the complaint raises a threshold question of the constitutionality of the statute under the provisions of the constitution of the State of New York."

We assume that defendants wish us to apply the doctrine of abstention, since it is clear that the Court has jurisdiction of the First Amendment issue.

ularly unsuitable in this case because, as indicated in the convening judge's opinion (322 F.Supp. at 688), plaintiffs have no standing under New York law to litigate the state constitutional question in the New York courts. We are unimpressed by the proposal in the state's brief that we should abstain because "there is no assurance that that Court [i.e., Court of Appeals of New York] would not now reverse the position that it took in earlier cases . . . " in the light of the holding in *Flast* v. *Cohen,* 392 U.S. 83 (1967), that a federal taxpayer has standing to sue for constitutional violations. Nothing in the New York Court of Appeals' decisions since *Flast* encourages or supports the state's argument on this point.

II.

We come to the federal constitutional question. We are guided so clearly by the decision of the Supreme Court last term in *Lemon* v. *Kurtzman* and *Earley* v. *DiCenso,* 403 U.S. 602 (1971), that we need not review at length earlier cases which articulated constitutional limits on governmental assistance to church-supported schools. The boundaries of permissible government action in the field were set by *Everson* v. *Board of Education,* 330 U.S. 1 (1947), and *Board of Education* v. *Allen,* 392 U.S. 236 (1968). In *Everson,* the Court upheld a New Jersey statute which reimbursed *parents* for bus fares of children attending parochial schools. However, the *Everson* Court cautioned that its decision carried to "the verge" of what Chief Justice Burger, in *Lemon,* described as the "forbidden territory under the Religion Clauses." In *Allen,* the Court found that a New York law under which the state loaned school books to *students* at parochial schools passed con-

stitutional muster. Neither case involved a statute which, as here, grants direct subsidies to parochial schools; and in *Lemon* the Court struck down two such plans.

The *Lemon-Earley* decision dealt with Pennsylvania and Rhode Island statutes which, as here, provided for cash payments intended to assist parochial schools in the acknowledgedly grave financial crisis which faces them. The Rhode Island statute, resting on a legislative finding that the quality of education available in nonpublic schools was jeopardized by rising salaries needed to attract teachers, authorized state officials to supplement the salaries of teachers of secular subjects in nonpublic elementary schools by direct limited payment to the teacher. The teacher was bound to teach only subjects and use only teaching materials offered in public schools, and not to teach any course in religion. Eligible schools were required to submit to the state financial data necessary to determine the propriety of payments under the Act. The Pennsylvania statute, also based on a legislative finding of rapidly rising costs in the state's nonpublic schools, authorized the Superintendent of Public Instruction to "purchase" "secular educational services" from nonpublic schools. The purchase was consummated by state reimbursement to nonpublic schools of actual expenses for teachers' salaries, text books and materials. To secure reimbursement, a school was required to follow specified accounting procedures subject to state audit. Reimbursement was limited to such secular courses as mathematics, foreign languages, physical science, and physical education, and prohibited courses that contained "any subject matter expressing religious teaching, or the morals or forms of worship of any sect."

From this analysis it is apparent that the New York statute before us more closely resembles the Pennsylvania than the Rhode Island statute, and our decision is guided by the Supreme Court's observations as to the former. Indeed, the sole differences of substance which exist between the Pennsylvania statute and New York's mandated services law are that reimbursement was permitted under the Pennsylvania law principally for teaching, whereas here it is allowed primarily for testing; and under the Pennsylvania statute a school was required, subject to audit, to account to the state, while here the school is not. We find these distinctions insufficient to avoid the rule of *Lemon-Earley,* concluding, as did the *Lemon* Court, "that the cumulative impact of the entire relationship arising under the statute[s] . . . involves excessive entanglement between government and religion."

The *Lemon* Court's finding of excessive entanglement was based on an examination of the "character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority." *Lemon,* supra, at 615.

In the case at hand there is no question as to the character and purposes of the institutions which are benefited. No dispute exists as to the close association of the schools to the religious institutions of various faiths which support them. Indeed, the record establishes that payments are made to schools which, for example, impose religious restrictions on admissions, require attendance of pupils at religious activities, and are an integral part of the religious mission of the supporting church.

The nature of the aid provided here is precisely the same as the state aid provided by Pennsylvania in *Lemon*—that is, financial assistance paid directly to the church-related school. Even before its holding in *Lemon* that such payments violated the establishment clause, the Court had cautioned in *Walz* v. *Tax Commission*, 397 U.S. 664, 675 (1970):

> "Obviously a direct money subsidy would be a relationship pregnant with involvement and, as with most governmental grant programs, could encompass sustained and detailed administrative relationships for enforcement of statutory or administrative standards."

The defendants here contend that the rationale of *Lemon-Earley* and the quoted *Walz* passage are inapplicable to the New York statute, which does not require, either on its face or as administered, any "detailed administrative relationship for enforcement" of the statute. It is said that, since the New York law simply does not require beneficiaries to report on their use of the funds, the vice foreseen in *Walz* and found fatal in *Lemon* does not exist here.

The argument is unpersuasive. As the *Lemon* Court commented:

> "The history of government grants of a continuing cash subsidy indicates that such programs have almost always been accompanied by varying measures of control and surveillance." (at 621).

We think this lesson of history is applicable here. Indeed, the gentle inquiry of the Board of Regents which caused studies to be made to determine whether the costs to the

nonpublic schools for mandated services are actually as great as the amounts they receive from the state is a sort of inching in that direction. It is not unreasonable to assume that, in this day of tight budgets and taxpayer uneasiness, the dictates of sound administration, or political pressures, will likely give birth to a system of surveillance and controls intended to assure that, at the least, the state is not paying for more than it is receiving. Indeed, section 8 of the statute itself states: "Nothing contained in this Act shall be construed to authorize the making of any payment under this Act for religious worship or instruction." It is difficult to see how the Board of Regents or the Commissioner can in good faith implement the language of section 8 without sooner or later instituting the type of surveillance and controls which the *Lemon* Court found to foster excessive entanglement.

Assuming, however, that such a prognosis is unfounded, the alternative leaves the statute even more vulnerable. For if no system of audit or control is to be instituted, this will leave the schools free, as they apparently are now, to keep their shares of the apportioned moneys regardless of whether their expenses are as great as their receipts, and to use any excess for the general purposes of their religious missions. The dilemma we have outlined is insoluble. Either the statute falls because a system of surveillance and control would create excessive entanglement, or, without such a system, the schools would be free to use funds for religious purposes. The constitution is breached whichever route is chosen.

Defendants argue that the strictures of *Lemon* and *Walz* against cash payments do not apply here because reimburse-

ment is being made for services which are "secular, neutral, or nonideological" (*Lemon*, at 616) analogous to the payments which were approved in *Everson* and *Allen*. The analogy, however, is inapposite. Bus transportation, school lunches, public health services, and secular text books (for which payment was approved in *Everson*, *Allen* and other cases) are of a character entirely different from services rendered by teachers in administering tests not only developed by the state, but those developed by the schools or the teachers. By far the greatest portion of the funds appropriated under Chapter 138 is paid for the services of teachers in testing students, and testing is an integral part of the teaching process. As the Court commented in *Lemon*, "teachers have a substantially different ideological character from books." It is this fundamental distinction which makes the limited rules of *Everson* and *Allen* inapplicable. Nor does the fact that the reimbursement by New York is for "mandated services" rescue the statute. It is true, of course, that administration of tests, recording attendance of students, and compiling health records are required by the state, but so is teaching required by the state if a private school, parochial or otherwise, is to be certified as an adequate substitute for public school. It would be fanciful to suggest, however, that the state would be free to reimburse the schools for ordinary teaching expenses on the theory that the state "mandates" such services.

Even if all these observations were not true, the statute would nevertheless be constitutionally flawed. As the *Lemon-Earley* Court stated:

> "A broader base of entanglement of yet a different character is presented by the divisive political potential of these state programs." (at 622).

The Court held there that in a community with a large number of pupils served by church-related schools (surely true in the present case) it is reasonable to assume that state assistance will result in the aggravation of divisive political activity on the part of supporters and opponents of the annual appropriation legislation. The Court concluded (at 622) that "... political division along religious lines was one of the principal evils against which the First Amendment was intended to protect." Measured by this standard, the New York statute suffers precisely the same constitutional defects as both the Pennsylvania and Rhode Island statutes in *Lemon-Earley.*

While we thus conclude that Chapter 138 violates the establishment clause of the First Amendment, it is proper for us to note our sympathetic awareness of the serious financial problems directly facing the parochial schools and, indirectly, the public. We recognize and appreciate the contribution which private schools have made financially and in providing that variety of approach to education which enriches community life. But the First Amendment, which has for two centuries assured the individual's right to worship as he chooses, protected the church from the impositions of the state, and immunized the national community against the ills of religious-political divisiveness, must be our guiding star.

A permanent injunction against the enforcement of the statute will be granted. The defendants' motions are denied.

Submit order on notice.

Dated: New York, New York
April 27, 1972

/s/ PAUL R. HAYS, *C.J.*
/s/ MORRIS E. LASKER, *D.J.*

Dissenting Opinion of Palmieri, *D.J.*
Dated April 27, 1972

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

70 Civ. 3251

COMMITTEE FOR PUBLIC EDUCATION AND RELIGIOUS LIBERTY, *et al.*,

Plaintiffs,

—against—

ARTHUR LEVITT, as Comptroller of the State of New York, and EWALD B. NYQUIST, as Commissioner of Education of the State of New York,

Defendants,

and

CATHEDRAL ACADEMY, Albany, New York, ST. AMBROSE SCHOOL, Rochester, New York, BISHOP LOUGHLIN MEMORIAL HIGH SCHOOL, Brooklyn, New York, BAIS YAAKOV ACADEMY FOR GIRLS, Richmond Hill, New York, and YESHIVAH RAMBAM, Brooklyn, New York,

Intervenor-Defendants.

Before

HAYS, *Circuit Judge,*
PALMIERI and LASKER, *District Judges.*

PALMIERI, J.

I respectfully dissent. The statute under review is, in my opinion, a legitimate exercise of the duty of the state

to assure that all children, regardless of the school they attend, receive adequate and full-time instructions in the secular subjects required by standards fixed by law. The private and parochial schools of New York State have been part of a single unitary system of education for many years and they have been under the jurisdiction of the Board of Regents since 1784.

I deplore the incalculable and irreversible harm which will be done by this decision. The statute invalidated by the majority decision is a reimbursement statute. It provides only a fractional reimbursement for the cost of record keeping and testing by non-public schools and required of them by state law and regulation. The record is uncontested that the sums appropriated by the legislature to assure attendance and adequate examination procedures are much less than the schools expend for such purposes. This provides adequate assurance that government funds are not available for examination functions peculiar to religious institutions. To suggest otherwise is to let prejudice against education under religious auspices prevail over wise analysis.[1] It is a tragic symptom of our time that so simple an objective of a state legislature, simply implemented, should become a focus of objection by those who appear to share deep antipathies and fears with regard to secular education under religious auspices. One is impelled to ask whether the eyes of those who have such fears may be blinded by tragic conflicts now lost in history and which anteceded that of our own Constitution.

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[1] This comment and those immediately following are not intended to reflect upon my esteemed colleagues but are directed to those who appear to be making a career of this type of destructive litigation.

Dissenting Opinion of Palmieri, D.J.

I am constrained to decline to participate in destroying this legislative act by judicial action. A vast majority of the legislature of the State of New York, and the Governor of that state, have determined that this partial reimbursement statute is a legitimate area of state concern and action, free of constitutional restraint. This court today undertakes the serious responsibility of overturning legislative findings of reasonableness. It takes this step notwithstanding the Supreme Court's statement in *Tilton* v. *Richardson*, 403 U.S. 672, 678 (1971), that

> "candor compels the acknowledgment that we can only dimly perceive the boundaries of permissible government activity in this sensitive area of constitutional adjudication"

and that "[j]udicial caveats against entanglement" are a "blurred, indistinct and variable barrier." *Lemon* v. *Kurtzman*, 403 U.S. 602, 614 (1971). It has long been held that separation of church and state cannot mean the absence of all contact. Beginning with state police and fire protection for churches, the theory of allowable contact has expanded with the reimbursement procedures in *Everson* v. *Board of Education*, 330 U.S. 1 (1947), the allocation procedure for free books in *Board of Education* v. *Allen*, 392 U.S. 236 (1968), and *Cochran* v. *Louisiana State Board of Education*, 281 U.S. 370 (1930), and the administrative relationships inherent in the tax exemption in *Walz* v. *Tax Commission of the City of New York*, 397 U.S. 644 (1970).[2] If, as the Supreme Court pointed out in *Allen*, *supra* at 247, a state "has a proper interest in the manner in which those [private] schools perform their secular educational func-

[2] This language is borrowed substantially from P.O.A.U. v. Essex, 28 Ohio State 2d 79 (1971).

tion" then that interest is appropriately implemented here. I can perceive nothing in the decision of the Supreme Court in *Lemon* v. *Kurtzman and Earley* v. *DiCenso*, 403 U.S. 602 (1971), which requires the conclusions reached by the majority. There is neither entanglement nor involvement between church and state, let alone "the excessive government entanglement with religion" condemned in that case, *supra* at 613, and in *Walz, supra* at 674. Indeed, reimbursement for attendance and examination services duly performed by operation of law is clearly within the guidelines established by the Supreme Court in *Lemon-Earley* where it said (at page 616) that its "decisions from *Everson* [*supra*] to *Allen* [*supra*] have permitted the States to provide church-related schools with secular, neutral, or nonideological services, facilities, or materials."

Accepting, as I believe we must, the basic premise that no perfect or absolute separation between religion and government is really possible, see *Walz* v. *Tax Commission of the City of New York, supra* at 670, I agree patly with the views of Judge Oakes very recently expressed in the case of *Americans United for Separation of Church and State* v. *Oakey* (D. Vt., No. 6393, March 6, 1972) that we should "search for ways within the American system of public education that will preserve, indeed promote, the diversity of individual belief—religious, political and social—that, along with our Bill of Rights, distinguishes us so plainly from certain uniform, unified and unigoverned societies elsewhere in the world."

I would hold that this statute neither on its face nor as applied by the defendants is unconstitutional, and I would dismiss the complaint on the merits.

/s/ Edmund L. Palmieri
U.S.D.J.

Dated: April 27, 1972

Order and Judgment of Hays, *C.J.* and Lasker, *D.J.*
Entered June 1, 1972

In the

UNITED STATES DISTRICT COURT

For the Southern District of New York

70 Civ. 3251

Committee for Public Education and Religious Liberty, Bernard Backer, Algernon D. Black, Theodore Brooks, Herschel Chanin, Naomi Cowan, Rebecca Goldblum, Benjamin Haiblum, Blanche Lewis, Edward D. Moldover, Aryeh Neier, David Seeley, Albert Shanker and Howard M. Squadron,

Plaintiffs,

—against—

Arthur Levitt, as Comptroller of the State of New York, and Ewald B. Nyquist, as Commissioner of Education of the State of New York,

Defendants.

This action having come on to be heard on the merits before the Court, the Honorable Paul R. Hays, Circuit Judge, the Honorable Edmund L. Palmieri and the Honorable Morris E. Lasker, District Judges for the Southern District of New York, and after hearing argu-

ments of counsel, the Court having rendered an opinion dated April 27, 1972, it is hereby

ORDERED AND ADJUDGED

1. That the defendants' motion to dismiss the complaint is denied.

2. Chapter 138 of the Laws of the State of New York of 1970 is hereby declared to be unconstitutional in violation of the First Amendment of the United States Constitution.

3. The defendants and their agents and all persons acting for or on behalf of the State of New York are permanently enjoined from making any payments or disbursements out of State funds pursuant to the provisions of Chapter 138 of the New York Laws of 1970, in payment for or reimbursement of any moneys heretofore or hereafter expended by nonpublic elementary and secondary schools.

4. The order and judgment of the Court filed on the 19th day of May, 1972, is hereby vacated.

Dated: New York, New York
June 1, 1972

/s/ PAUL R. HAYS,
Circuit Judge

/s/ MORRIS E. LASKER,
District Judge

JUDGMENT ENTERED 6/1/72

/s/ JOHN LIVINGSTON

Notice of Appeal of Cathedral Academy, St. Ambrose School and Bishop Loughlin Memorial High School

[Filed June 30, 1972]

UNITED STATES DISTRICT COURT

Southern District of New York

70 Civ. 3251

Committee for Public Education and Religious Liberty, Bernard Backer, Algernon D. Black, Theodore Brooks, Herschel Chanin, Naomi Cowan, Rebecca Goldblum, Benjamin Haiblum, Blanche Lewis, Edward D. Moldover, Aryeh Neier, David Seeley, Albert Shanker and Howard M. Squadron,

Plaintiffs,

—against—

Nelson A. Rockefeller, as Governor of the State of New York, Arthur Levitt, as Comptroller of the State of New York, and Ewald B. Nyquist, as Commissioner of Education of the State of New York,

Defendants,

—and—

Cathedral Academy, St. Ambrose School, Bishop Loughlin Memorial High School, Bais Yaakov Academy for Girls and Yeshivah Rambam,

Intervenor-defendants,

—and—

Senator Earl W. Brydges, as Majority Leader and President Pro Tem of the New York State Senate,

Intervenor-defendant.

Notice of Appeal to the Supreme Court of the United States

Notice of Appeal of Cathedral Academy, et al.

SIRS:

Notice is hereby given that the above-named intervenor-defendants Cathedral Academy, St. Ambrose School and Bishop Loughlin Memorial High School hereby appeal to the Supreme Court of the United States from the Order and Judgment entered in this action on June 1, 1972 permanently enjoining the "defendants and their agents and all persons acting for or on behalf of the State of New York . . . from making any payments or disbursements out of State funds pursuant to the provisions of Chapter 138 of the New York Laws of 1970, in payment for or reimbursement of any moneys heretofore or hereafter expended by nonpublic elementary and secondary schools."

This appeal is taken pursuant to 28 U.S.C. § 1253.

Dated: New York, N. Y.
June 30, 1972

Yours, etc.

DAVIS POLK & WARDWELL

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Notice of Appeal of Bais Yaakov Academy for Girls and Yeshivah Rambam

[Filed July 11, 1972]

UNITED STATES DISTRICT COURT

Southern District of New York

70 Civ. 3251

Committee for Public Education and Religious Liberty, Bernard Backer, Algernon D. Black, Theodore Brooks, Herschel Chanin, Naomi Cowan, Rebecca Goldblum, Benjamin Haiblum, Blanche Lewis, Edward D. Moldover, Aryeh Neier, David Seeley, Albert Shanker and Howard M. Squadron,

Plaintiffs,

—against—

Nelson A. Rockefeller, as Governor of the State of New York, Arthur Levitt, as Comptroller of the State of New York, and Ewald B. Nyquist, as Commissioner of Education of the State of New York,

Defendants,

—and—

Cathedral Academy, St. Ambrose School, Bishop Loughlin Memorial High School, Bais Yaakov Academy for Girls and Yeshivah Rambam,

Intervenor-defendants,

—and—

Senator Earl W. Brydges, as Majority Leader and President Pro Tem of the New York State Senate,

Intervenor-defendant.

Notice of Appeal to the Supreme Court of the United States

Notice of Appeal of Bais Yaakov Academy, etc. et al.

SIRS:

Notice is hereby given that the above-named intervenor-defendants Bais Yaakov Academy for Girls and Yeshivah Rambam hereby appeal to the Supreme Court of the United States from the Order and Judgment entered in this action on June 1, 1972 permanently enjoining the "defendants and their agents and all persons acting for or on behalf of the State of New York . . . from making any payments or disbursements out of State funds pursuant to the provisions of Chapter 138 of the New York Laws of 1970, in payment for or reimbursement of any moneys heretofore or hereafter expended by nonpublic elementary and secondary schools."

This appeal is taken pursuant to 28 U.S.C. § 1253.

Dated: New York, New York
July 7, 1972

Yours, etc.

JULIUS BERMAN and MARCEL WEBER, Esqs.

By JULIUS BERMAN /s/
Attorneys for Intervenor-defendants Bais Yaakov Academy for Girls and Yeshivah Rambam
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PLaza 9-8400

Notice of Appeal of Bais Yaakov Academy, etc. et al.

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Chapter 138 of the 1970 Laws of New York

AN ACT

To provide for the apportionment of state monies to certain nonpublic schools in connection with inspection and examination, and making an appropriation therefor

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. It is hereby determined and declared as a matter of legislative finding:

That the state has a primary responsibility to assure that its precious resource, the young people of the state, receive educational opportunity which will prepare them for the challenges of American life in the last decades of the twentieth century.

That the state has the duty and authority to provide the means to assure, through examination and inspection, and through other activities, that all of the young people of the state, regardless of the school in which they are enrolled, are attending upon instruction as required by the education law and are maintaining levels of achievement which will adequately prepare them, within their capabilities.

That these fundamental objectives are accomplished with respect to public schools in part through the provision by the state of aid to local school districts to meet such costs.

Nonpublic schools of the state are responsible for the education of more than 850,000 pupils in the state in conformity with the compulsory education law, and it is a matter of state duty and concern that the attendance, examination and other administrative services of the schools which these children attend in fulfillment of the above state pur-

poses are adequately assisted in furtherance of the general welfare and that in enacting this measure the legislature will be reasonably assisting such services.

§ 2. There shall be apportioned annually by the commissioner to each qualifying school, for school years beginning on and after July first, nineteen hundred seventy, the amounts set forth below, out of funds appropriated therefor, for expenses of services for examination and inspection in connection with administration, grading and the compiling and reporting of the results of tests and examinations, maintenance of records of pupil enrollment and reporting thereon, maintenance of pupil health records, recording of personnel qualifications and characteristics and the preparation and submission to the state of various other reports as provided for or required by law or regulation. The amount to be apportioned to each qualifying school in each school year shall be the sum of the following:

a. The product of fifteen cents multiplied by one hundred eighty multiplied by the average daily attendance in such school in the base year and receiving instruction in grades one through six; and

b. The product of twenty-five cents multiplied by one hundred eighty multiplied by the average daily attendance in such school in the base year and receiving instruction in grades seven through twelve.

The apportionment shall be reduced by one one-hundred eightieth for each day less than one hundred eighty days that such school was actually in total session in the base year, except that the commissioner may disregard such re-

duction up to five days if he finds that the school was not in session for one hundred eighty days because of extraordinarily adverse weather conditions, impairment of heating facilities, insufficiency of water supply, shortage of fuel or the destruction of a school building, and if the commissioner further finds that such school cannot make up such days of instruction during the school year. No such reduction shall be made, however, for any day on which such school was in session for the purpose of administering the regents examinations or the regents scholarship examinations, or any day, not to exceed three days, when such school was not in session because of a conference of teachers called by the principal of the school.

§ 3. In this act:

1. "Average daily attendance" shall mean the total number of attendance days of enrolled pupils who are resident of the state during the base year divided by the number of days the school was in session during the base year; except that for the school year commencing July first, nineteen hundred seventy, the term "average daily attendance" means the total number of attendance days of such enrolled pupils during either September, October or November of such school year, as selected by the school, divided by the number of days such school was in session during such month.

2. "Base year" shall mean the school year immediately preceding the current year, except that for the school year commencing July first, nineteen hundred seventy, the base year shall be such school year, and any reduction in aid

required for such base year by virtue of the failure to maintain the required total session shall be made in the apportionment in the subsequent school year.

3. "Commissioner" shall mean the state commissioner of education.

4. "Current year" shall mean the school year during which an apportionment is to be paid pursuant to this chapter.

5. "Qualifying school" shall mean a nonprofit school in the state, other than a public school, which provides instruction in accordance with section thirty-two hundred four of the education law.

§ 4. Each school which seeks an apportionment pursuant to this act shall submit to the commissioner an application therefor, together with such additional reports and documents as the commissioner may require, at such times, in such form and containing such information as the commissioner may by regulation prescribe in order to carry out the purposes of this act.

§ 5. The amount to be apportioned to a school in any current year shall be paid in two installments, the first to consist of one-half of the estimated total apportionment and to be paid between January fifteenth and March fifteenth of such year, and the second to consist of the balance and to be paid between April fifteenth and June fifteenth of such year; provided that the commissioner may provide for later payments for the purpose of adjusting and correcting apportionments.

§ 6. Apportionments made for the benefit of any school which is not a corporate entity shall be paid, on behalf of such school, to such corporate body as may be designated for such purpose pursuant to regulations promulgated by the commissioner.

§ 7. The sum of twenty-eight million dollars ($28,000,000) or so much thereof as may be necessary, is hereby appropriated to the education department out of any monies in the state treasury in the general fund to the credit of the local assistance fund not otherwise appropriated, for the purposes of this act. Such sum shall be payable on order and warrant of the comptroller on vouchers certified or approved by the commissioner of education in the manner provided by law.

§ 8. Nothing contained in this act shall be construed to authorize the making of any payment under this act for religious worship or instruction.

§ 9. Any school receiving aid pursuant to this act shall be subject to the provisions of section three hundred thirteen of the education law.

§ 10. This act shall take effect September first, nineteen hundred seventy.